Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHARLES I. ONWULATA

Appeal No. 2002-2333
Application No. 09/741,467

ON BRIEF

Before KIMLIN, PAK and PAWLIKOWSI, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-16.

Claim 1 is illustrative:

1. A dietary fiber composition produced by a process comprising

cooking a calcium caseinate or calcium caseinate and whey protein isolate slurry, wherein said slurry contains no more than 50% whey protein isolate, in an evaporator to produce a slurry of cross-linked matrices of protein,

adding dietary fiber to said slurry of cross-linked matrices of protein to form a mixture, and

spray atomizing said mixture in a spray dryer to produce said dietary fiber composition.

The examiner relies upon the following reference as evidence of obviousness:

Kuipers et al. (Kuipers)	4,315,954	Feb. 16, 1982

Appellant's claimed invention is directed to a dietary fiber composition produced by the recited process. The process entails cooking a protein slurry comprising calcium caseinate in an evaporator to produce a slurry of cross-linked matrices of protein. Dietary fiber is then added to the cross-linked matrices of protein to form a mixture, which is then spray atomized in a spray dryer to produce the claimed composition.

Appealed claims 1-16 stand rejected under 35 U.S.C. § 103 as being unpatentable over Kuipers.

We have thoroughly reviewed the respective positions advanced by appellant and the examiner. In so doing, we find ourselves in agreement with the position espoused by appellant that the examiner has not established a prima facie case of obviousness for the claimed subject matter. Accordingly, we will not sustain the examiner's rejection.

While it is true that product-by-process claims define a product, and not the process by which the product is produced,

the examiner, nonetheless, is not relieved from establishing a prima facie case that the claimed product is not patentably distinct from the prior art product. Before the burden is shifted to an applicant to demonstrate that the claimed and prior art products are, in fact, patentably distinct, the examiner must first make the case that the claimed product reasonably appears to be substantially the same as the product disclosed by the prior art. In the present case, it is our judgment that the examiner has not carried this initial burden.

As emphasized by appellant, the claimed composition is produced by first forming cross-linked matrices of protein in an evaporator, and then adding dietary fiber to the cross-linked matrices before spray atomizing the mixture in a spray dryer. On the other hand, Kuipers provides no disclosure that the protein is first processed into cross-linked matrices before mixing the protein with dietary fiber. Kuipers teaches no processing of the protein before a mixture is formed with fiber, which mixture is subsequently extruded at temperatures higher than those used in the claimed evaporator. In view of this distinct difference in the processes employed by appellant and Kuipers, it is incumbent upon the examiner to set forth a rationale why it would be reasonable to conclude that the processed cross-linked

matrices of appellant are essentially the same as the processed composition of Kuipers. This, however, the examiner has not done. In addition, there is declaration evidence of record by one of ordinary skill in the art which offers the opinion that "Kuipers' product is not the same or similar to Onwulata's [appellant's] product" (page 2 of Declaration, second paragraph).

In conclusion, based on the foregoing, the examiner's decision rejecting the appealed claims is reversed.

REVERSED

EDWARD C. KIMLIN Administrative Patent Judge	)	
CHUNG K. PAK Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
BEVERLY PAWLIKOWSKI Administrative Patent Judge	)	

ECK:clm

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